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No. 98 - 1059

IN THE

Supreme Court of the United States

October Term, 1998

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

Petitioner,

V.

ANIMAL LEGAL DEFENSE FUND, INC., *et al*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-1059

NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH,

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v.

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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1. The Federal Respondents agree that the decision of the *en banc* majority of the District of Columbia Circuit is wrong. Opposition of Federal Respondents ("Fed. Opp.") at 5. Their sole basis for opposing certiorari is an argument that the case is in an "interlocutory posture" because the court of appeals has not yet decided the merits of Mr. Jurnove's claim that the regulation at 9 C.F.R. § 3.81 is invalid. Fed. Opp. at 5.

In fact, however, the practice of this Court does not support the conclusion that the writ should be withheld until the merits of the case are finally decided by the court below. The 16 cases cited in the margin show that the Court has repeatedly

granted certiorari to review standing decisions before the lower courts have rendered a final decision on the merits.[1] Once the court of appeals renders a final decision on Article III standing, the pendency of the underlying dispute has not been viewed as a barrier to immediate review of the constitutional issue in this Court.

No respondent has cited any case that is to the contrary. Neither standing nor any other issue of Article III jurisdiction was presented in the two cases the Federal Respondents cite for the proposition that the Court "generally" withholds the writ until the lower courts render final judgment on the merits. *See* Fed. Opp. at 5, citing *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) and *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916).[2] The certiorari petition in *Brotherhood of Locomotive Firemen* was directed at a

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[1] *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *United States v. Williams*, 514 U.S. 527 (1995); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Franchise Tax Bd. of California v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990); *Allen v. Wright*, 468 U.S. 737 (1984); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592 (1982); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *United States v. Richardson*, 418 U.S. 166 (1974); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974).

[2] The two certiorari denials cited by the Private Respondents – the Animal Legal Defense Fund, Mr. Jurnove, and the other individual plaintiffs – for a similar proposition are inapposite. *See* Brief in Opposition to Petition for Writ of Certiorari ("Private Opp.") at 18-19. Neither case involved standing, and each raised a question that the lower courts had not finally resolved. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372 (1893). *American Construction Co.*, cited by the Private Respondents, and *Hamilton-Brown*, cited by the Federal Respondents, are also of limited relevance insofar as they were decided at a time when a very different statutory scheme, the Judiciary Act of 1891, 26 Stat. 826, governed this Court's certiorari jurisdiction. (The Judiciary Act of 1925, 43 Stat. 936, significantly expanded the scope of that jurisdiction.)

contempt of court issue that the lower courts had not yet finally resolved. *Hamilton Brown* similarly involved an intellectual property dispute that had not been fully resolved in the lower courts. Of equal importance, in the latter case the Court suggested that certiorari had been denied at an earlier stage because of a contention that no question of public interest or importance was presented. 240 U.S. at 257.

The essential point is that the *en banc* decision of the District of Columbia Circuit is that court's final word on the standing issues presented by the Petition. No case cited by any of the respondents involved comparable circumstances. Where, as here, the question presented is a fundamental jurisdictional issue – such as a plaintiff's Article III standing to sue in federal court – review on certiorari is eminently appropriate once the lower court's ruling on standing is final.

2. The Private Respondents argue that Petitioner is guilty of factual misrepresentations, that the decision below is correct, and that Petitioner's right to be in this case is open to question. They are wrong on each point.

a. Petitioner's factual statement was accurate. The Private Respondents wrongly claim that Petitioner "misrepresents that the final regulation at issue requires social grouping." Private Opp. at 5. The regulation, 9 C.F.R. § 3.81, states, as the Petition correctly quotes, that plans of regulated facilities "must include specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature," and authorizes only limited exceptions to social grouping. *See* Pet. at 5 & n.1. The Private Respondents, to be sure, reject the *legal* interpretation of the regulation that both Petitioner and the Federal Respondents consider correct, but the existence of that disagreement does not render Petitioner's factual statement inaccurate or misleading.

The Private Respondents also fault Petitioner for not "adequately" describing the extended notice-and-comment rulemaking proceeding that resulted in the regulation at issue here. Private Opp. at 2. They emphasize that the Department of Agriculture "significantly modified its regulatory approach" after

receiving a large number of comments from scientists criticizing the regulation as initially proposed. *Id.* at 4-5. But the fact that the agency published a proposed rule, "gave careful and extensive consideration to the more than 11, 900 public comments received on [its] proposal," 56 Fed. Reg. 6426, 6485 (1991), and promulgated a modified final rule "implement[ing], to the extent possible, performance standards, innovative ideas, and professional judgment for meeting the needs of captive animals," *id.*, is hardly the stuff of revelation. It shows only that the notice-and-comment rulemaking procedure functioned precisely according to its statutory design. The Private Respondents were disappointed with the outcome of that process, but, contrary to their argument, the course of the rulemaking process is not among "the facts pertinent to the Court's consideration of whether *certiorari* should be granted." *See* Private Opp. at 1.

Indeed, any omissions or distortions of "critical facts," Private Opp. at 1, in the papers before this Court are to be found not in the Petition but in the Opposition filed by the Private Respondents. Although the Private Respondents have attached Mr. Jurnove's affidavit to their Opposition, their brief fails to acknowledge numerous facts that go directly to the standing issues presented in the Petition.

Those facts include that: Mr. Jurnove first visited the Long Island Game Farm to investigate the conditions of equines, not to observe primates. Jurnove Aff. ¶ 7, Private Respondents' Appendix ("PR App.") A-3. He returned several times to document violations of United States Department of Agriculture ("USDA") regulations, not to further any purported aesthetic interest in viewing primates. *Id.* ¶¶ 19, 22, PR App. A-7, A-9. The bulk of his affidavit concerns bears, camels, llamas, sheep, rabbits, a cougar, a raccoon, donkeys, and deer. *Id.* ¶¶ 9, 10, 12, 13, 16, 20, 37, PR App. A-4 to A-8, A-14. Mr. Jurnove is able to observe primates and other exotic animals "in various zoos and other parks near [his] . . . home." Jurnove Aff. ¶ 7, PR App. A-3. The majority of upsetting conditions he observed with respect to primates constitute clear violations *not* of 9 C.F.R. § 3.81, but of section 3.75(c)(ii) (sharp objects, *id.* ¶ 8, PR App. A-3), sections 3.78(b) and 3.80(a)(2)(vi) (cold, *id.* ¶ 14, PR App. A-6)

and section 3.75(c)(3) (filth, *id.* ¶ 15, PR App. A-6). His affidavit makes clear that his April 1996 visit to the Game Farm was motivated by his desire to observe "all the improvements that would have been made as a result of USDA's September, 1995 inspection, which I had been responsible for." *Id.* ¶ 33, PR App. A-13.

b. The Private Respondents misapprehend the Court's jurisprudence. In their defense of the decision below, the Private Respondents claim that Petitioner misread or ignored *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Sierra Club v. Morton*, 405 U.S. 727 (1972). *See* Private Opp. at 11-12. In fact, the majority decision below cannot be reconciled with those two cases.

As an initial matter, the Court found the plaintiffs in both cases to *lack* standing. 504 U.S. at 578; 405 U.S. at 741. Although the Private Respondents accurately quote the Court's statement in *Defenders of Wildlife* that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing," 504 U.S. at 562-63, they ignore the immediately following passage: "*But the 'injury in fact' test requires more than an injury to a cognizable interest.*" *Id* (emphasis added). An identical statement is found in *Sierra Club*, 405 U.S. at 734-35. The lesson of these two cases, which is very much applicable to the present case, is that constitutional injury-in-fact requires more than an adverse impact on "a desire to . . . observe an animal species."

Contrary to the Private Respondents' contention, Mr. Jurnove does not come within the counter-example set out in *Defenders of Wildlife*. *See* Private Opp. at 13. The *dictum* in question states that a person "who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist." 504 U.S. at 566. At most, this statement acknowledges that cognizable injury may be suffered by a plaintiff who complains of a diminution in the overall number of animals in a species that is available for observation or work-related purposes. It is an untenable stretch from that proposition to a

finding that a zoo visitor sustains constitutionally cognizable injury-in-fact by seeking out a distant zoo where he believes he will find animals treated in a way that he finds emotionally distressing. The Private Respondents have not cited a single case that is inconsistent with Petitioner's statement that "no prior decision of this Court or any court of appeals has found a cognizable aesthetic injury-in-fact in the absence of facts demonstrating a tangible threatened reduction in a plaintiff's opportunities to observe specific species of animals or specific environmental phenomena." Pet. at 11.

There is no merit to the Private Respondents' claim that *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), "simply does not apply here" because Mr. Jurnove *observed*, rather than *read about*, the animals whose condition distressed him. *See* Private Opp. at 12. In finding that Americans United lacked standing, the *Valley Forge* Court did not distinguish cases of "visual observation," and indeed specifically wrote that "the psychological consequences presumably produced by *observation* of conduct with which one disagrees . . . is not an injury sufficient to confer standing." 454 U.S. at 485 (emphasis added). Thus, contrary to the Private Respondents' contention, the decision speaks directly to cases, such as this one, that involve "visual observation of the illegal conduct by a person whose aesthetic interests are injured by that conduct." *See* Private Opp. at 12. Not surprisingly, *Valley Forge* is cited in virtually every lower court decision that addresses claims of aesthetic or other abstract injury.[3]

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[3] *See, e.g., State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998); *Suhre v. Haywood*, 131 F.3d 1083 (4th Cir. 1997); *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156 (7th Cir. 1994); *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101 (2d Cir. 1992); *Apache Bend Apartments v. United States*, 964 F.2d 1556 (5th Cir. 1992), *on rehearing*, 987 F.2d 1174 (5th Cir. 1993); *Murray v. City of Austin, Texas*, 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992); *McKinney v. Dept. of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986); *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982), *rev'd on other grounds*, 465 U.S. 668 (1984); *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Foster v. Center Township of Laporte County*, 798 F.2d 237 (7th Cir. 1986); *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982) (Tjoflat, J., dissenting); *Flora v. White*, 692 F.2d 53 (8th Cir. 1982); *ACLU v. Rabun County*

The failure of the *en banc* majority even to mention *Valley Forge* stands in stark contrast to the extensive body of standing jurisprudence represented by the cases cited in the margin.

The Private Respondents' efforts to respond on the issues of causation and redressability are no more persuasive. Causation for Article III purposes was neither briefed by the parties nor addressed by the Court in *National Credit Union Administration v. First Nat'l Bank and Trust Co.*, 522 U.S. 479 (1998). *Compare* Private Opp. at 16-17. And *Defenders of Wildlife* explicitly undermines their position on redressability. "Suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations," the Court wrote, are "rarely if ever appropriate for federal court adjudication." 504 U.S. at 568, *quoting Allen v. Wright*, 468 U.S. 737, 759-60 (1984). "The most obvious problem," the Court added, "is redressability" – the only relief available would have been an order to the Secretary of the Interior to redraft the endangered species regulations, but there was no guarantee this would cause the non-parties responsible for the alleged injury to modify their behavior. *Id.* at 568-71. Mr. Jurnove lacks redressability for precisely the same reason.

c. Petitioner is properly in this case. There is no merit to the Private Respondents' suggestion that certiorari should be denied on the ground that Petitioner's status is open to question. Private Opp. at 18. In 1993, Petitioner and Respondent ALDF litigated the exact issue of Petitioner's right to intervene after judgment in the district court for purposes for prosecuting an appeal from a district court decision invalidating 9 C.F.R. § 3.81, the regulation at issue here. The attack on 9 C.F.R. § 3.81 in that case was in every respect identical to the Private Respondents' substantive contentions in this case. *See Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994). After the district court denied Petitioner's 1993 motion to intervene, the court of appeals unanimously granted Petitioner's motion for summary

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Chamber of Commerce, 678 F.2d 1379 (11th Cir. 1982), *modified*, 698 F.2d 1098 (11th Cir. 1983).

reversal. That decision was firmly rooted in earlier decisions of the District of Columbia Circuit.[4]

The Private Respondents suggest the 1993 case is distinguishable, arguing that in the present case there was "no question that the government [was] going to appeal the ruling, thereby fully protecting NABR's interests." Private Opp. at 18. In fact, however, the government did appeal the 1993 judgment that prompted Petitioner's intervention in that case. Further, the motion to intervene in the present case was filed only after government counsel stated that Petitioner "would be well advised not to look to the Government to represent [Petitioner's] . . . interests and those of its members and that [Petitioner] . . . should speak for itself in this case." Declaration of Michael Socarras (Exhibit B to NABR's Memorandum of Points and Authorities In Support of Motion [to Intervene]), *ALDF v. Glickman*, 943 F. Supp. 44 (D.D.C. 1996) (No. 96-408).

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[4] *See United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Zuber v. Allen*, 387 F.2d 862 (D.C. Cir. 1967); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967).

CONCLUSION

The petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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